No. 02-682

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

DANIEL J. POPEO
DAVID A. PRICE
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 588-0302

STEVEN G. BRADBURY
Counsel of Record
KANNON K. SHANMUGAM
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

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STATEMENT PURSUANT TO RULE 29.6

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INTEREST OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus* in this and other federal courts to address the proper scope of the antitrust laws. *See, e.g., United States Tobacco Co. v. Conwood Co., cert. denied*, 123 S. Ct. 876 (2003); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003).

WLF is concerned that the decision below would open new frontiers of liability for successful enterprises in a range of industries. WLF files this brief to assist the Court not only in resolving the substantive legal issues presented in this case, but also in understanding the economic and policy implications of the parties' positions. WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to reaffirm the basic principle that the antitrust laws do not ordinarily impose affirmative duties to deal, even on monopolists. In recognizing respondent's claims that petitioner had such duties under the antitrust laws, the court of appeals added new obligations to those imposed by Congress' calibrated scheme for regulating the telecommunications industry. The

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of all *amicus* briefs; pursuant to Supreme Court Rule 37.3, letters evidencing this consent have been filed with the Clerk.

implications of the Second Circuit's expansive view of the antitrust laws, however, sweep far beyond the context of this and other regulated industries. Using the antitrust laws to compel the sharing of facilities deters, rather than encourages, competition, by effectively ordering a taking of a company's property and creating disincentives for that company and its competitors to make investments in facilities.

The decision below is erroneous on multiple grounds, and should be reversed. At the outset, the court of appeals erred by concluding that respondent has antitrust standing. Under settled principles of proximate causation, only directly injured plaintiffs may bring suit under the Clayton Act. Because petitioner's competitors stand in a better position to pursue respondent's claims than respondent itself, the court below erred by allowing respondent's suit to proceed.

The court of appeals fared no better on the merits of respondent's claims. It first erred by concluding that respondent had stated a viable claim under Section 2 of the Sherman Act on the basis of the "essential facilities" theory. That theory has never been recognized by this Court, and has rightly been the object of widespread criticism. And even if "essential facilities" is a valid theory of liability under the Sherman Act in some circumstances, it certainly is not here, where Congress has imposed an independent duty to deal, and created procedures to establish the terms of such dealing, under a subsequent, industry-specific statute.

Finally, the court of appeals also erred by concluding that respondent had stated a valid Section 2 claim under the "monopoly leveraging" theory. To the extent that that theory has been viewed as providing an independent basis for liability under Section 2 even absent monopolization or attempted monopolization, it has implicitly been abrogated by this Court, and is inapposite in any event where a plaintiff is alleging merely that a defendant failed to supply an *input* to its competitors, rather than using its monopoly in the market for

one distinct product to gain a competitive advantage in the market for another.

ARGUMENT

THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S DISMISSAL OF RESPONDENT'S ANTITRUST CLAIMS.

A. This Court Should Hold That Respondent Lacks Antitrust Standing To Pursue Claims Under The "Essential Facilities" And "Monopoly Leveraging" Theories Against Petitioner.

The Court should resolve this case on the threshold ground that respondent, as a customer of petitioner's competitor, lacks antitrust standing to pursue its claims under the "essential facilities" and "monopoly leveraging" theories. Assuming *arguendo* that those theories provide a basis for liability in this case under Section 2 of the Sherman Act (and, as we will shortly demonstrate, *see infra* Parts B-C, they do not), only AT&T, as the party most directly injured by petitioner's alleged conduct, has standing to pursue such claims. The court of appeals erred by holding that respondent also has standing, and the decision below can be reversed on that basis.

1. Antitrust standing is a prudential doctrine that sweeps more broadly than the jurisdictional doctrine of Article III standing. *See Associated Gen. Contractors of Cal., Inc. v. California Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983) (*AGC*). In order to establish antitrust standing, a plaintiff must demonstrate that he has suffered antitrust injury, defined (somewhat tautologically) as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). That requirement is anchored not only in the language of Section 4 of the Clayton Act, which provides a private right of action only for those plaintiffs injured "by reason of" violations of the

Sherman Act, *see Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 267-68 (1992), but also in background common-law principles of proximate causation, *see id.* at 268-69.

From an economic standpoint, the doctrine of antitrust standing serves three primary purposes, all of which this Court has previously recognized. *See Holmes*, 503 U.S. at 269; *AGC*, 459 U.S. at 541-44. *First*, it ensures that only those plaintiffs whose injuries are clearly attributable to the antitrust violation, rather than to independent factors, can recover, and thereby protects against overrecovery. *Second*, it frees courts from the often burdensome and speculative task of estimating damages for plaintiffs whose injuries are indirect. *Third*, it protects against overdeterrence, to the extent that directly injured victims can generally be expected to pursue antitrust violators, and obtain treble damages, without indirectly injured victims bringing suit as well.[2]

Perhaps the best-known limitation on antitrust standing is the "indirect purchaser" rule established in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In that case, various governmental entities brought suit against manufacturers of concrete block, claiming that the defendant manufacturers conspired to fix prices in violation of Section 1 of the Sherman Act. *See id.* at 726-27. The plaintiff governmental entities did not purchase concrete block directly from the manufacturers, but instead purchased it indirectly by buying buildings that incorporated the manufacturers' concrete block. *See id.* at 726. Despite the fact that plaintiffs had allegedly paid higher prices as a result of the alleged price fixing, the Court refused to allow their claims to proceed. The Court emphasized that allowing

[2] Indeed, allowing indirectly injured victims to sue could make it more difficult for directly injured victims to settle their claims with antitrust defendants, thereby running the risk of "retard[ing] rather than advanc[ing] antitrust enforcement." *See* William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws?* 46 U. Chi. L. Rev. 602, 604 (1979).

indirect purchasers to recover would "add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness," *id.* at 737, by requiring courts to "trace the effect of [an] overcharge through each step in the distribution chain from the direct purchaser to the ultimate consumer," *id.* at 741. The Court added that barring indirect purchasers from recovery would not significantly disserve the purpose of deterring antitrust violations, since direct purchasers would ordinarily have every incentive to bring suit themselves. *See id.* at 745-46. Allowing indirect purchasers to recover, the Court concluded, would serve only to "carry the compensation principle to its logical extreme." *Id.* at 746.

2. To be sure, respondent's action presents a somewhat different fact pattern than *Illinois Brick*. There, the end consumer suffered the same type of injury as its distributor: namely, higher prices as a result of the manufacturers' alleged price fixing. Here, by contrast, respondent, the end consumer, allegedly suffered consequential losses resulting from petitioner's failure to provide AT&T with sufficient access to its local network — an injury that is arguably conceptually distinct from AT&T's more direct injury, in the form of lost sales and reputational injury, from its inability to sign up and retain local subscribers due to its deficient access.

Even assuming, however, that respondent suffered a conceptually distinct injury, and further assuming that AT&T could not itself recover for that injury (thereby reducing the danger of multiple recovery), the policy justifications behind the antitrust standing doctrine support the same result in this case as in *Illinois Brick*. The mere fact that respondent's injury may be *distinct* does not necessarily render it sufficiently *direct* to establish antitrust standing. *See, e.g., AGC*, 459 U.S. at 540-41 (barring suit by union for conspiracy to coerce businesses to deal with non-union contractors). Indeed, there is even *less* of a justification for allowing suit in this case than in *Illinois Brick*, because respondent, apparently unlike the plaintiffs in *Illinois*

Brick, will not necessarily go uncompensated. Respondent could simply sue AT&T for breach of its express or implied contractual obligation to provide local service of sufficient quality (assuming, of course, that respondent had not waived its right to sue). *See* Richard A. Epstein, *Into the Frying Pan: Standing and Privity Under the Telecommunications Act of 1996 and Beyond*, 5 Colum. Sci. & Tech. L. Rev. (forthcoming 2003), *available at* http://www.manhattan-institute.org/MI_RAE_paper.pdf.

Moreover, allowing respondent's suit is not necessary to serve the underlying goal of deterrence. In fact, AT&T has already sought and obtained relief from petitioner for its alleged misconduct, in the form of a consent decree settling AT&T's administrative complaints. *See* Pet. 5a. Indeed, in most if not all "essential facilities" or "monopoly leveraging" cases, competitors will stand in a far better position to vindicate any injury than end consumers, for much the same reason that direct purchasers in *Illinois Brick* cases stand in a better position than indirect purchasers: namely, their injuries are likely to be larger and easier to establish. *See Illinois Brick*, 431 U.S. at 747. And competitors are usually better positioned to learn of any misconduct than are end consumers. A rule barring respondent's suit is therefore "not likely to leave a significant antitrust violation undetected or unremedied." *AGC*, 459 U.S. at 542.[3]

Ultimately, "[l]ife is too short to pursue every human act to its most remote consequences." *Holmes*, 503 U.S. at 287

[3] In addition, respondent, unlike AT&T, would have to prove causation. *See Holmes*, 503 U.S. at 269. Specifically, respondent would have to prove that the poor quality of its local phone service was attributable to (1) petitioner's failure to provide sufficient access to AT&T, rather than to (2) any failure by AT&T in its provision of services to respondent or (3) any deficiencies in respondent's own telephone system. Even if respondent could prove causation, moreover, similar problems could exist for each member of respondent's proposed class. *See* Epstein, *supra*.

(Scalia, J., concurring in the judgment). If AT&T's millions of customers were allowed to pursue claims under the "essential facilities" and "monopoly leveraging" theories against AT&T's competitors, the requirement of antitrust standing would lose virtually any meaning — to say nothing of the resulting increase in the costs of antitrust litigation. The rule that any plaintiff with a discrete type of injury can sue would work a dramatic expansion of the antitrust standing doctrine, and the Second Circuit's decision on antitrust standing should therefore be reversed.

B. This Court Should Either Refuse To Recognize The "Essential Facilities" Theory, Or Hold That It Does Not Apply In This Case.

The court of appeals also erred in holding that respondent had stated a cognizable claim under the "essential facilities" theory, under which monopolists are required to share certain facilities with their competitors. As a threshold matter, there are good reasons to reject "essential facilities" altogether as a theory of liability under Section 2 of the Sherman Act. At a minimum, however, this Court should hold that respondent does not state a valid claim under that theory here.

1. This Court has never expressly adopted "essential facilities" as a theory for Section 2 liability. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part). At most, this Court's prior Section 2 cases suggest certain narrow exceptions to the baseline rule that Section 2 merely *bars* monopolists from engaging in monopolistic conduct, rather than affirmatively *requiring* them to deal with their competitors.

a. Lower courts have frequently traced the "essential facilities" theory to this Court's decision in *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912). In *Terminal Railroad*, a consortium of railroad companies acquired essentially all of the terminal facilities for trains going

to or from St. Louis. *See id.* at 391-94. The member companies did not build the facilities themselves, but instead merely acquired existing facilities and combined them into a unitary system. *See id.* at 391. To be sure, the Court might well have concluded that these facilities were "essential": indeed, the Court noted that, because of the peculiar topography of the St. Louis area, it would have been prohibitively expensive for a competitor to duplicate the facilities controlled by the consortium. *See id.* at 397. The Court seemed to focus, however, primarily on the fact that the member railroad companies acted as an illegal combination to exclude other railroads. *See, e.g., id.* at 404. The Court ultimately ordered the member railroads not to provide *access* to the facilities to other railroads, but rather to *admit* those railroads to their consortium. *See id.* at 411. In essence, therefore, the Court remedied the monopoly "not by structural relief that would have restored active competition, but by requiring that the existing combination be universal." Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 Stan. L. Rev. 1187, 1197 (1999).

b. This Court's decision in *Associated Press v. United States*, 326 U.S. 1 (1945), similarly involved an improper combination of competitors. In *Associated Press*, the Court held that a press agency could not allow existing members to block the admission of competitors, but instead was required to admit newcomers on a nondiscriminatory basis. *See id.* at 21. In so concluding, however, the Court appeared only to find a violation of Section 1 of the Sherman Act, not Section 2. *See, e.g., id.* at 6. The Court did not conclude that the press agency had monopoly power, and in fact expressly refused to conclude that the press agency was a "public utility" that was obligated to deal with all comers. *See id.* at 19; *but see id.* at 28-29 (Frankfurter, J., concurring) (stating that business serving "public interest" has such an obligation). For those reasons, *Associated Press* "fits uncomfortably — if at all — into the

ordinary conception of the essential facilities doctrine." Lipsky & Sidak, *supra*, at 1201.

c. In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the Court considered a claim that an electric utility violated Section 2 of the Sherman Act by refusing to sell power to, or transfer power for, municipalities that undertook to distribute power at the retail level themselves, rather than allowing the utility to do so. The utility refused to sell power to, or transfer power for, the municipalities even though it was doing so for other customers. *See id.* at 378. Again, the Court might well have concluded that the facilities of the public utility were "essential." In holding that the utility had violated Section 2, however, the Court seemed to rely more on a general conception of monopoly leveraging (namely, that the utility used its "dominance" in the transmission of power to foreclose entry in the retail market) than a more specific notion of essential facilities, as the court below had done. *See, e.g., id.* at 377. Moreover, the public utility not only refused to deal with the municipalities, but also engaged in affirmative misconduct, in the form of sham litigation, *see id.* at 379-80, and anticompetitive contracts with its competitors, *see id.* at 378-79. And while the Court imposed an obligation on the electric utility to deal with municipalities, it was silent on the appropriate *terms* of dealing. *See* Lipsky & Sidak, *supra*, at 1206.

d. Finally, lower courts have frequently cited this Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 (1985) as supporting an "essential facilities" theory. In that case, the defendant operated three of the four skiing facilities in Aspen, Colorado; the plaintiff operated the other. *See id.* at 587-90. Plaintiff brought suit after defendant abandoned a joint marketing arrangement, under which the two companies issued joint tickets for their ski areas. *See id.* at 592-93. Defendant then marketed its own multi-day pass, and prevented plaintiff from marketing any sort of multi-area pass

— going so far as to refuse to sell to plaintiff passes to defendant's own ski area, even at the full retail price. *See id.* at 593-95. The Court specifically refused to decide whether plaintiffs could state a claim under an "essential facilities" theory. *See id.* at 611 n.44. Instead, the Court concluded that defendant's conduct was "exclusionary" and constituted an improper refusal to deal, relying heavily on its assessment that defendant "made a deliberate effort to discourage its customers from doing business with [plaintiff]." *Id.* at 610. It is questionable whether the Court's decision in *Aspen Skiing* "stands for any principle that goes beyond its unusual facts." *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (Posner, J.). But it is clear that, regardless of whether *Aspen Skiing* would have been an appropriate case for application of an "essential facilities" theory — and, to the extent that it involved only the *termination* of a joint agreement, it arguably was not — the Court did not adopt any such theory in holding the defendant's conduct unlawful.[4]

2. The "essential facilities" theory has been widely criticized as a basis for Section 2 liability, especially in cases involving unilateral conduct. *See, e.g.*, 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 772c, at 173 (noting that "essential facilities" theory is "both harmful and unnecessary and should be abandoned"); Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 Geo. L.J. 395, 397, 401 (1986) (concluding that "essential facilities" theory is of "dubious character" and adding that "[i]t is not surprising that the most acute commentary rejects such a notion"); *cf. State Oil Co. v. Khan*, 522 U.S. 3, 16-17 (1997) (citing academic criticism of *per se* rule against vertical maximum price fixing as basis for

[4] From an economic perspective, *Aspen Skiing* is a problematic decision, to the extent that it appears to ignore the *adverse* effects on consumer welfare that may have resulted from the preexisting joint marketing agreement. *See* Lipsky & Sidak, *supra*, at 1211.

abandoning that rule). Indeed, there are good reasons that this Court should dispense with the "essential facilities" theory altogether. The net effect of this theory is to "force firms to share their monopolies" with their rivals, by making critical inputs available to them. By allowing rivals to obtain access to inputs through litigation, however, the theory discourages rivals from developing their own alternative inputs, and deters companies from making investments in the first place in inputs that will ultimately have to be shared with competitors. *See Iowa Utils.*, 525 U.S. at 428-29 (Breyer, J., concurring in part and dissenting in part); *see generally* Adam Thierer & Clyde Wayne Crews Jr., *What's Yours Is Mine: Open Access and the Rise of Infrastructure Socialism* 9-22 (2003) (contending that compelled sharing results in a taking of property rights and discourages entrepreneurial competition). Indeed, there is good reason to believe that the mere *threat* of compelled sharing has already deterred companies from fully developing their own inputs in similar markets. *See* Thomas W. Hazlett & George Bittlingmayer, *The Political Economy of Cable "Open Access,"* 2003 Stan. Tech. L. Rev. (forthcoming), *available at* http://www.manhattan-institute.org/hazlett/working_01_06.pdf.

To be sure, there may be "limited circumstances" in which the sharing of truly "essential" facilities would be "potentially welfare-enhancing in theory": that is, circumstances in which long-term consumer welfare would be higher as a result of the forced sharing of monopolized inputs than as a result of the development of competing inputs. Lipsky & Sidak, *supra*, at 1223. To the extent that is true, however, the "essential facilities" theory places courts in the difficult position of identifying those few cases in which "mandatory access to the facility will enhance the long-term welfare of consumers, regardless of the effect on individual competitors." Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 Yale L.J. 417, 468-69 (1999).

Even in those cases, moreover, courts will also have the difficult task of deciding "reasonable" prices and terms for such forced access. "[T]he wisdom of judicial regulation of essential facilities requires an assessment of the administrative complexity of the relief proposed." *Id.* at 470. Particularly in cases involving complex and rapidly evolving industries (such as the telecommunications industry), this task should be left to independent regulation by specialized agencies, which are better equipped to design efficient regulatory systems. *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, then-J.) (noting that "antitrust courts normally avoid direct price administration"); Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal: Why* Aspen *and* Kodak *Are Misguided*, 68 Antitrust L.J. 659, 661 n.4 (2001) (observing that "[a] judge or jury is not a substitute for a regulatory agency"); Lipsky & Sidak, *supra*, at 1223 (noting that "[t]he salient policy question is whether courts * * * are competent to identify natural monopolies and to formulate and administer regulatory schemes capable of enhancing welfare — a most difficult task even for the best of tailor-made regulatory institutions"). In short, applying the "essential facilities" theory would require courts to "assume the day-to-day controls characteristic of a regulatory agency." Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 853 (1989).

3. This case provides a singularly poor vehicle for application of an "essential facilities" theory, not only because it would require courts to engage in the complex task of setting "reasonable" terms of access to telecommunications facilities, but also because Congress has already enacted a comprehensive regulatory scheme governing access to such facilities. The Telecommunications Act of 1996 requires incumbent local telephone companies to supply access to their competitors, *see* 47 U.S.C. § 251, and provides a mechanism for the resolution

of disputes when parties are unable to agree on the terms of access, *see* 47 U.S.C. § 252.

If it were indeed true that the antitrust laws impose a duty on local telephone companies to provide local loop access under the "essential facilities" theory, the provisions of the 1996 Act imposing a similar duty would be redundant. *See Cavalier Telephone, LLC v. Verizon Va., Inc.*, No. 02-1337, 2003 WL 21153305, at *11 (4th Cir. May 20, 2003) (noting that "Congress enacted * * * the Telecommunications Act to impose *entirely* new duties, which were in addition to the duties imposed by § 2 of the Sherman Act" and adding that "[Congress] did not intend to have the duties imposed by the Telecommunications Act modify or expand the scope of the Sherman Act"). Moreover, the antitrust laws cannot be read to mandate *terms* of access that may differ from those established under the procedures prescribed by the 1996 Act, since such a reading would contravene the well-established principle of statutory construction that "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended." *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (refusing to allow FDA general authority to regulate tobacco under Food, Drug, and Cosmetic Act in light of specific authority granted by subsequent statutes).

For better or worse, the 1996 Act effectively sets terms for access to the local loop. Allowing antitrust liability for failure to comply with those terms would impose potentially crippling liability burdens far beyond those contemplated by the 1996 Act itself. *See Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 742 (9th Cir. 1981) (Kennedy, then-J.) (noting that "the proper role of antitrust courts is to accommodate the peculiar circumstances under which regulated entities operate"). And allowing antitrust liability for failure to provide access on

different terms would effectively allow judges and juries to override decisions by more experienced regulators, with the result that "[t]he elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action." *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 401 (7th Cir. 2000).

In sum, the "essential facilities" theory is unworkable and unwise. At a minimum, if the Court does not definitively foreclose the application of the "essential facilities" theory altogether, it should refuse to apply the theory here.

C. This Court Should Either Refuse To Recognize The "Monopoly Leveraging" Theory As An Independent Basis For Section 2 Liability, Or Hold That It Does Not Apply In This Case.

Finally, the court of appeals erred in holding that respondent had stated a cognizable claim under the "monopoly leveraging" theory. This Court should make clear that "monopoly leveraging" is no longer a viable independent basis for Section 2 liability. Moreover, in the event that the Court decides to resuscitate the "monopoly leveraging" theory, respondent does not state a valid claim under that doctrine, either.

1. The "monopoly leveraging" theory bars monopolists from "leveraging" a monopoly in one market to gain an advantage in another market. The theory appears to have originated from this Court's decision in *United States v. Griffith*, 334 U.S. 100 (1948), in which the Court seemed to suggest that a monopolist in one market could violate Section 2 by engaging in "leveraging" even if no monopoly was threatened in the second market. *See, e.g., id.* at 107 (suggesting that Section 2 prohibits "the use of monopoly power * * * to gain a competitive advantage"); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979) (same).

However, in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993), this Court appeared to foreclose "monopoly leveraging" altogether as an independent basis for Section 2 liability. There, the Court rejected the argument that proof of a mere intent to monopolize could suffice to prove a dangerous probability of monopolization, as is required for a claim of attempted monopolization under Section 2. *See id.* at 459. In so holding, the Court reasoned that Section 2 "makes the conduct of a single firm unlawful *only when it actually monopolizes or dangerously threatens to do so.*" *Id.* (emphasis added). Both before and after *Spectrum Sports*, a number of courts have rejected the "monopoly leveraging" theory. *See, e.g., Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 206 (3d Cir. 1992); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991); *United States v. Microsoft Corp.*, No. 98-1232, 1998 WL 614485, at *26-*27 (D.D.C. Sept. 14, 1998).

The Court's implicit abrogation in *Spectrum Sports* of "monopoly leveraging" as an independent basis for Section 2 liability is entirely logical. Where, for example, a company merely uses monopoly profits from one market to fund efforts to increase market share in another market at the expense of its competitors, consumers suffer no injury, unless the company actually develops a monopoly in the second market (thereby increasing prices or reducing output in the market). *See, e.g., United States v. Western Elec. Co.*, 900 F.2d 283, 296 (D.C. Cir. 1990). Where there is a dangerous probability of monopolization in the second market, a plaintiff can always sue for attempted monopolization; and where a company actually conditions purchase of its product in the second market on purchase of its product in the monopolized first market, a plaintiff can sue for tying even absent a danger of monopolization in the second market. In light of these two protections against predatory conduct by monopolists in other

markets, an independent "monopoly leveraging" theory is superfluous, and should be expressly discarded.

2. In any event, respondent fails to state a valid "monopoly leveraging" claim. One prerequisite of "monopoly leveraging" is a showing of two separate markets. *See, e.g., Berkey Photo*, 603 F.2d at 276. Here, respondent claimed that the first market, over which petitioner allegedly had a monopoly, was the "wholesale market in which it sells access to the local loop to telecommunications carriers," and that the second market was the "retail market in which telecommunications carriers sell local phone services to consumers." Pet. 30a. Even assuming that there is a "market" for access to the local loop — notwithstanding the fact that such a "market" exists only insofar as it is *required* by the 1996 Act — it is clear that there is no distinct *product* as to which petitioner allegedly has a monopoly. To the extent that respondent is claiming that petitioner is using its exclusive access to a particular *input* to gain a competitive advantage in the market for its end product, that claim is really an "essential facilities" claim, not a "monopoly leveraging" claim — and, as we have already demonstrated, *see supra* Part B, respondent cannot allege a valid claim under that doctrine either. Respondent's "monopoly leveraging" claim is simply old wine in a new bottle, and should similarly be discarded.[5]

D. This Court Should Be Cautious About Broad Theories Of Antitrust Liability In Light Of The Dangers Of Meritless And Vexatious Litigation.

There are good reasons that this Court should be especially wary of either expanding the range of plaintiffs that have antitrust standing, or of recognizing broad theories of antitrust liability such as "essential facilities" and "monopoly

[5] Indeed, if the Court were to allow a "monopoly leveraging" claim in these circumstances, it would expose a vertically integrated firm to antitrust liability whenever it has a monopoly in the manufacture of an input, even if it voluntarily offers that input to competitors in the market for its end product.

leveraging." Especially in light of the notice-pleading standards of Fed. R. Civ. P. 8, such claims would ordinarily be easy to plead, thereby enabling antitrust plaintiffs easily to survive the motion-to-dismiss stage and engage in intrusive, disruptive, and costly discovery. With ordinary Section 2 claims, by contrast, courts retain the discretion to insist on "some specificity in pleading before allowing a potentially massive factual controversy to proceed." *AGC*, 459 U.S. at 528 n.17.

Particularly in the antitrust context, in which treble damages are available, unduly allowing claims (especially class-action claims) to proceed beyond the motion-to-dismiss stage will place defendants under intense pressure to settle — even where the underlying claims are meritless and indeed vexatious. *See, e.g., Verizon Del., Inc. v. Covad Communications Co.*, 232 F. Supp. 2d 1066, 1068-69 (N.D. Cal. 2002) (noting allegation that similar lawsuit by competitor of Verizon was based on false factual allegations); Communications Daily, Jan. 30, 2003, at 5 (quoting allegation that AT&T funded similar lawsuit by another competitor of Verizon on ground that "anything that aggravates Verizon is good for AT&T"). Such concerns are particularly acute in the specific context of lawsuits like this one, which can potentially be brought for the purpose not only of recovering antitrust damages, but also of obtaining leverage in contractual negotiations for local-loop access under the 1996 Act. *See, e.g., Cavalier Telephone, LLC v. Verizon Va., Inc.*, No. 3:01CV736, slip op. at 4 (E.D. Va. Nov. 21, 2001) (suggesting leverage as motive for litigation).

By foreclosing lawsuits such as this one, this Court can ensure that the underlying legal theories at issue are not used as vehicles for meritless and vexatious claims. The court of appeals' decision should be reversed, and the lawsuit against petitioner dismissed.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

DANIEL J. POPEO
DAVID A. PRICE
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 588-0302

STEVEN G. BRADBURY
Counsel of Record
KANNON K. SHANMUGAM
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

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